CHAPTER SEVEN

THE INTERNATIONAL CRIMINAL COURT:
A HYBRID "DIRECT ENFORCEMENT SYSTEM"

SECTION 1. THE NEED FOR AN ICC

World War I was to be “the war to end all wars,” but even its horrors were not
eight to compel post-conflict justice.1 A relatively short time later, the world
again found itself embroiled in another conflict of even greater proportions.
After the atrocities of World War II were revealed, the international community
embarked on the first systematic experience in post-conflict justice, though lim-
ited to the defeated.2 After that, the international community promised “never
again,” but that promise was never kept.3 Since then, some 250 international,
regional, and internal armed conflicts have occurred.4 These conflicts, along
with human rights violations perpetrated by repressive regimes, have resulted
in casualties that range in estimate from 70 to 170 million deaths.5 The harm-
ful consequences are almost beyond comprehension when viewed cumulatively,
but these stark realities must now be faced and addressed. Tragically, there have
been few mechanisms for accountability, and thus also for deterrence.

Since the trial of the Nazi leadership at Nuremberg, governments have for the
most part regressed to the convenient practices of realpolitik, whereby account-
ability and justice are bargained-for political compromises.6 One of the outcomes

---

1 See M. Cherif Bassiouni, World War I: The War to End all Wars, and the Birth of a Handicapped
International Criminal Justice System, 33 Denv. J. Int’l. L. & Pol’y 255 (2002); see supra Chapter
V, section 2.
2 See supra Chapter V, section 2.
3 See, e.g., M. Cherif Bassiouni, Post-Conflict Justice (2002).
4 M. Cherif Bassiouni, Searching for Peace and Achieving Justice, 59 Law & Contemp. Probs. 9, 10 (1996); see also Daniel Chirot, Modern Tyrants: The Power and Prevalence of Evil
in our Age (1994); Pierre Hassner, Violence and Peace: From the Atomic Bomb to Ethnic
Cleansing (1995); Rudolph J. Rummel, Death by Government (1994); Erik Hobsbawm, The
Jongman & A.P. Schmid, Contemporary Conflicts: A Global Survey of High and Lower Intensity Con-
flict and Serious Disputes, 7 PIOOM Newsletter and Progress Report 14 (Winter 1995) (Inter-
disciplinary Research Program on Causes of Human Rights violations, Leiden, The Netherlands),
and Study. 6 PIOOM Newsletter 17 (1994); Alex P. Schmid, Early Warning of Violent Conflicts:
Casual Approaches, in VIOLENT CRIME & CONFLICTS 47 (ISPAC 1997); PIOOM World Conflict Map
5 See supra note 1.
of this approach has been that *jus cogens* crimes, such as aggression, genocide, crimes against humanity, war crimes, slavery and slave-related practices, and torture, have increased in almost all parts of the world. Moreover, many governments in a position to prevent or mitigate these tragic events or to pursue restorative and retributive justice have regrettably remained passive, and at times even supportive of these practices.

Consequently, instead of being held accountable for these international crimes, most of the perpetrators have benefited from impunity either *de facto* or *de jure*. International civil society has, however, expressed a growing opposition to the practice of granting impunity, particularly for the leaders who ordered the commission of atrocities and those senior commanders who executed these unlawful orders. A large part of the international community wants to put an

---


9 *De facto* impunity may occur either when the failure to investigate or prosecute is intentional, though not sanctioned by law, or when a legal system is unable to meet its obligations to investigate and prosecute. In some instances, a given state may be willing but unable to carry out investigation and prosecution. This may occur in the aftermath of conflict, when states are faced with many competing priorities. In these situations, governments often fail to prioritize effective criminal justice and limit resources for prosecutions or fail to ensure that positions are staffed with competent professionals who pursue their functions with diligence and ethics. Thus, states without functioning judicial systems impede the goals of international civil society to provide accountability and justice. *De jure* impunity occurs when any of a number of appropriate accountability mechanisms are preempted by the granting of amnesties or like measures. These may include blanket amnesties covering a given period of time or applying to a given group of persons or may be specifically given to an individual. The following accountability mechanisms have been employed in the resolution of conflicts: international prosecutions, international investigatory commissions, national investigatory and truth commissions, national prosecutions, lustration mechanisms, civil remedies, and mechanisms for victim compensation. See Bassiouni, *Searching for Peace*, supra note 4, at 18–22. It should also be noted that *de jure* impunity also can result when a state selects an inappropriate accountability mechanism, given the nature of the violation. This is especially true when the selection of a particular mechanism excludes all other forms. Thus, for example, a state may be fostering a policy of impunity if it opts for a truth commission as an accountability mechanism for genocide with an absolute bar on prosecution. Cumbersome legal procedures or inadequate periods of limitations that operate to frustrate prosecution or civil claims for damages are further examples.